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No. 93-1128

In the Supreme Court of the United States

OCTOBER TERM, 1994

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

FRED P. GARDNER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent contends that a no-fault interpretation of 38 U.S.C. 1151 (Supp. IV 1992) is necessary in order to place veterans with non-service-connected disabilities on an equal footing with those whose disabilities arose from military service. See Resp. Br. 14-16. That contention is based on a misunderstanding of the history and structure of the benefits provisions in question.

Congress first extended direct disability benefits, including free medical care, to World War veterans with service-connected conditions in 1917. Act of Oct. 6, 1917 (1917 Act), ch. 105, §§ 300-314, 40 Stat. 405-408. The 1917 Act extended such benefits to any servicemember with a "disability resulting from personal injury suffered or disease contracted in the line of duty" (§ 300, 40 Stat.

405) – language still found in the service-connected benefit provisions cited by respondent. See 38 U.S.C. 1110, 1131 (Supp. IV 1992). The 1917 Act further provided that, subject to certain requirements for establishing service connection, compensation would be payable for death or disability "proximately resulting" from a wartime injury. 1917 Act § 306, 40 Stat. 407; see also World War Veterans' Act, 1924 (1924 Act), ch. 320, § 206, 43 Stat. 622 ("Where there is official record of injury during service[,] compensation shall be payable * * * for death or disability whenever occurring, proximately resulting from such injury.").

These statutory provisions permitted compensation for disabilities resulting, not only from the natural progress of a wartime injury itself, but also from any reasonably foreseeable consequence of such an injury, including one arising out of medical care rendered, under the statute, for the original service-connected condition. See generally 7 Bureau of War Risk Ins. Gen. Coun. Op. 812, 814 (1920) (morphine addiction compensable where proximately caused by treatment for wartime head injury); 21 V.A. Gen. Coun. Op. 2822-A, 2822-C to 2822-D (1922) (dictum); 25 V.A. Gen. Coun. Op. 2974 (1923) (dictum); 26 V.A. Gen. Coun. Op. 3891 (1923) (disability incurred in industrial accident compensable where proximately caused by wartime injury and treatment therefor); 21 V.A. Gen. Coun. Op. 3352 (1922) (compensation payable for in-service football injury and natural progress thereof, but not for additional injury resulting from Dartmouth 1919 season or later industrial accident, which constituted independent intervening causes); see also 55 V.A. Gen. Coun. Op. 239 (1928) (discussing proximate causation); Digested V.A. Gen. Coun. Op. (Mar. 17, 1971) (same).[1]

[1] As with our opening brief (at 24 n.14), we will lodge with the Clerk and provide to respondent's counsel copies of original VA materials that may not otherwise be readily available.

Where a veteran incurred some new disability by reason of medical care negligently rendered by the VA, however, that mistreatment would apparently have been treated as an intervening, superseding cause that severed the proximate causal connection between the veteran's original condition and his subsequent disability. Disabilities caused by negligent treatment would therefore not have been deemed compensable under the 1917 Act. See generally 28 V.A. Gen. Coun. Op. 981 (1924) (accepting factual finding of service connection, but noting that claim would not normally lie for "improper conditions to which [veteran] was subjected in treatment"); see also 19 V.A. Gen. Coun. Op. 444 (1922) (government not liable for all mishaps during hospitalization, including assault by fellow patient). Similarly, if a veteran was injured during the course of examination or treatment for a condition that the VA ultimately determined was not service-connected, then any resulting disability was considered "not due to military service." 28 V.A. Gen. Coun. Op. 1309 (1924); see also 20 V.A. Gen. Coun. Op. 4933 (1922); 21 V.A. Gen. Coun. Op. 2822-A (1922); 25 V.A. Gen. Coun. Op. 2974 (1923). Because the statute authorized compensation and treatment only for disabilities proximately resulting from service-connected conditions, the VA evidently considered itself powerless to compensate veterans whose disability originated or increased under such circumstances.

It was most likely in order to remedy these gaps in the disability benefits scheme that VA Director Hines proposed, in 1923, that Congress add to the statute the provision that became Section 1151. See, *e.g.*, *World War Veterans' Legislation: Hearings on Proposed Legislation Before the House Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess. 122-123 (1924) [*House*

Hearings].[2] That provision could not have been intended to authorize the VA to provide compensation for disabilities proximately resulting from service-connected conditions, including from the normal course of careful medical treatment, because disabilities of that sort were already compensable under the 1917 Act. And it could not have been intended to address anomalies in the benefits available to veterans with non-service-connected conditions—to put them "on a par" with those treated for service-connected ailments (Resp. Br. 20)—because, with limited exceptions for tubercular and neuropsychiatric illnesses, those with conditions determined not to be service-connected were not eligible for VA treatment at all before 1924.[3] Section 213 of the 1924 Act, 43 Stat. 623, was therefore most probably intended instead to provide the VA with the authority to compensate veterans for disabilities that were proximately caused, not by their military

[2] Reproducing a letter to Senator David Reed from VA Director Hines, endorsing the proposal to provide compensation for veterans injured as a result of vocational training: "I would extend the principle * * * to include also ratable disabilities incurred without fault and due to the hazards of medical and surgical treatment. It seems that the whole purpose of giving such treatment * * * is defeated if, in the course of the * * * treatment, a disability is incurred without fault and due solely to the * * * treatment for which there is no authority to compensate because, of course, such disability is not directly connected with the service." The references to disabilities "incurred without fault" presumably refer to the absence of fault on the part of the veteran who "incurred" the disability.

[3] For the exceptions, see Act of Mar. 4, 1923, ch. 291, § 4, 42 Stat. 1524. Indeed, during the House hearings on the 1924 Act some question arose as to whether the benefits proposed under new Section 213 (now Section 1151) would apply at all to veterans with non-service-connected conditions, if the proposal to provide VA treatment for such conditions was also enacted. *House Hearings* 114-115.

service, but by negligent treatment or by some unforseeable medical accident.[4]

The same 1924 amendments that added what became Section 1151 also authorized the VA, for the first time, to provide medical benefits for non-service-connected conditions. 1924 Act § 202(10), 43 Stat. 620-621. Because the point of Section 1151 was to provide benefits to veterans for additional disabilities incurred as a proximate result of faulty VA medical care or unforeseeable medical accidents (rather than of the condition for which care was originally rendered), the benefits of the new provision extended to all veterans who incurred such disabilities, regardless of the original reason for their treatment. The fact that benefits under Section 1151 extend to disabilities arising out of treatment for both service-connected and non-service-connected conditions should not, however, obscure the fact that the government's assumption of responsibility in such cases rests on the premise that the disabling "injury" involved was a proximate result of medical care rendered by the government, rather than of the original condition requiring treatment.[5]

[4] Before 1924 the statute provided for VA examinations to determine whether a particular ailment was service-connected. See, *e.g.*, 1917 Act § 303, 40 Stat. 406-407. As suggested above, one purpose of Section 213 was apparently to provide compensation for veterans whose disability increased after such an examination, even though the examination determined that the veteran's additional condition was not service-connected. The original language of Section 213, which covered additional disabilities arising "as the result of training, hospitalization, or medical or surgical treatment," was not, however, considered broad enough to reach such cases. Congress therefore amended the statute in 1925 specifically to cover veterans whose additional disability arose "as a result of having submitted to examination" by the VA. Act of Mar. 4, 1925, ch. 553, § 11, 43 Stat. 1308.

[5] As noted in our opening brief (at 30 n.17), the same requirement of proximate causation applies to compensation under Section 1151 for injuries suffered "as the result of * * * the pursuit of a course of

Where an additional disability results from negligent medical treatment or an unforseeable accident during such treatment, Section 1151 treats the disability as the proximate result of the government's medical care. When an additional disability results from ordinary, non-negligent medical treatment by the VA of a pre-existing condition or disease, however, the statute and the regulations implementing it generally treat that disability as having been proximately caused by the condition requiring treatment, not by the VA's provision of medical services. Congress has made no decision to assume general responsibility for conditions, like respondent's herniated disc, that bear no relation to a veteran's military service and that result from non-negligent medical treatment.[6] Respondent received

vocational rehabilitation" under VA auspices. See 38 C.F.R. 3.358(c)(6) (compensation "is not payable unless there is established a direct (proximate) causal connection between the injury or aggravation of an existing injury and some essential activity or function which is within the scope of the vocational rehabilitation course"). Amicus National Veterans Legal Services Project argues (Br. 12-13) that the VA requires "*only* [a] causal connection" (emphasis added) in vocational rehabilitation cases. In both medical and rehabilitation cases, however, what both the statute and the implementing regulations require is a *proximate* causal connection between a claimant's disability and some *factual* cause for which the government has chosen to accept responsibility. In the case of medical treatment, that factual cause must be some inappropriate or unforeseeable occurrence during the course of the medical care rendered by the VA.

[6] The entire system of veterans' benefits is replete, now as in 1924, with differences in the benefits available for service-connected and non-service-connected conditions. Compare generally 38 U.S.C. 1101 *et seq.* (Supp. IV 1992) with 38 U.S.C. 1501 *et seq.* (Supp. IV 1992). The availability and rates of disability compensation, for example, vary widely depending on whether a particular disability is service-connected. Compare, *e.g.*, 38 U.S.C. 1110 and 1114 (Supp. IV 1992) with 38 U.S.C. 1521 and 1522 (Supp. IV 1992). Veterans with service-connected conditions generally have priority for VA medical

the full medical benefit that Congress has accorded veterans with non-service-connected conditions: he received free treatment for his back condition, and so far as the record shows that treatment was appropriate and competent. Any further disability incurred by respondent as a foreseeable result of proper medical care is not the responsibility of the government under the statutory plan. In light of the general absence in American law of provider liability for the normal risks of properly rendered medical care, respondent can offer no persuasive reason why the government should or would have chosen to assume such liability through the enactment of Section 1151 in 1924.

2. Respondent nonetheless contends (Br. 10-16) that the "plain language" of Section 1151 requires the result that he seeks in this case. That contention is, for the most part, sufficiently answered by the arguments set out in our opening brief (at 13-21).

Respondent argues in particular that the requirement that a disability arise "as a result of" VA medical care unambiguously requires only a cause-in-fact relationship between the disability and that care. Resp. Br. 11-12; see also National Veterans Legal Services Project (NVLSP)

care. See 38 U.S.C. 1710(a) (Supp. IV 1992). Eligibility for and the amount of survivors' benefits also vary on the basis of service connection. Compare, *e.g.*, 38 U.S.C. 1310-1317 (Supp. IV 1992) with 38 U.S.C. 1541-1543 (Supp. IV 1992). See also, *e.g.*, 38 U.S.C. 3701(b)(2), 3702(a)(2)(B) (Supp. IV 1992) (housing and small business loans); 38 U.S.C. 3901 (Supp. IV 1992) (special vehicle allowances); 38 U.S.C. 3221, 3222, 3202(1)(A) (Supp. IV 1992) (education benefits); 38 U.S.C. 2303, 2307 (Supp. IV 1992) (burial allowances). Respondent's contention that the VA's General Counsel has suggested that there should be no difference in treatment under Section 1151 between service-connected and non-service-connected disabilities (Resp. Br. 15-16, citing V.A. Gen. Coun. Op. 80-90 (1990)) is incorrect for the reasons stated in our reply brief at the petition stage (at 3 n.2).

Amicus Br. 12-13. This Court has previously held, however, that the similar statutory term "by reason of" may be read to establish either a purely factual causation standard, or a proximate causation standard more closely tied to the history and purposes of the statute in question. *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1316-1317 & nn.10-12 (1992). In *Holmes,* the Court concluded (*ibid.*) that the phrase "by reason of" in 18 U.S.C. 1964(c), which permits civil actions for violations of the Racketeer Influenced and Corrupt Organizations Act, should be read to require more than mere factual causation of a plaintiff's injury by the defendant's violation of the statute. The Court reached that conclusion at least in part on the basis of a consideration equally applicable in this case: "the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover." 112 S. Ct. at 1316. The VA has resolved a similar ambiguity in Section 1151 in essentially the same way, and the Court should defer to that reasonable interpretation.

3. a. Respondent argues (Br. 22-30) that the early administrative materials concerning the interpretation of Section 1151 reveal nothing more than "confusing inconsistencies influenced by concerns that have nothing to do with the original intent of Congress." Resp. Br. 26. As discussed in our opening brief (at 26-31), we believe that those materials demonstrate the articulation, in the years immediately following enactment of Section 1151, of an interpretation limiting benefits under that provision to cases where there was evidence of VA fault, or of some other unforeseen and untoward event sufficient to break the normal causal connection between an originally non-service-connected condition and the new disability for which benefits were claimed.

The development of successive regulations implementing the new provision, and the administrative decisions thereunder, reveal an ongoing process of interpretation in the light of practical experience. That is hardly surprising:

it was only after 1924 that the VA treated any significant number of patients for non-service-connected disabilities, and it was in that wholly new context that the precise limits of coverage under the new Section 213 first became particularly significant.[7] What is clear from the course of administrative proceedings in the first decade following enactment of the statute, however, is that under the leadership of General Hines, who first proposed enactment of Section 213 and who directed the VA from 1923 to 1945, the VA consistently interpreted the statute to require something more for an award of benefits than "[t]he usual after results of approved medical care and treatment properly administered." VA Reg. No. 167 (Feb. 21, 1927), § 7701(B)(4), *reprinted at* Gov't Br. App. 5a; see Gov't Br. 28-29. Assuming that respondent's factual allegations are true (see Gov't Br. 17 n.10), he claims compensation under Section 1151 for precisely such "usual after results" of proper care for a non-service-connected back condition. That claim would have been denied in 1927, and it was properly denied in this case.

b. Moreover, as discussed in our opening brief (at 31-36), there is ample reason to believe that Congress was aware of the VA's construction of Section 213 of the 1924 Act when it reenacted that Section in 1934 after having

[7] As respondent points out (Br. 27-29), there have been changes over the years in the details of the VA's implementation of the requirements of Section 1151, particularly with regard to compensation in cases involving unforeseeable and untoward events ("accidents") rather than VA fault. The continuing effort to refine the interpretation of what adverse medical outcomes were intended to be covered by the statute reflects responsible administration of a statute whose implementation sometimes requires difficult decisions arising out of novel conditions. See, *e.g.*, V.A. Gen. Coun. Op. 99-90 (1990) (HIV infection resulting from blood transfusion compensable as an "accident" if it occurred at time when risk of such infection was not reasonably foreseeable).

repealed it in 1933. As we have explained (Br. 34), the Senate sponsor of the amendment that restored Section 213 explained the provision to his colleagues as one relating to veterans "disabled by reason of mistreatment on the part of a Government agent." Perhaps even more important, in the economic context of the Great Depression, both the Senator and the VA offered Congress very modest estimates of the number of individuals covered by the provision and the cost of restoring their benefits—estimates that could not have been so low had the provision been intended to provide no-fault compensation for disabilities resulting from the many risks of competent medical care. See Gov't Br. 34-35. The debates over reenactment of veterans' benefits, including Section 213, dwelt at some length on the cost of the benefits to be restored, and on whether they would primarily benefit veterans whose disabilities were directly connected to their national service. See, *e.g.*, 78 Cong. Rec. 3047-3057, 3202-3210, 3289-3294, 3496-3497 (1934); *id.* at 5540-5541 (veto message); *id.* at 5541-5544, 5573-5606 (debate on overriding veto); see also Gov't Br. 35 n.21 (quoting Administrator of Veterans' Affairs Ann. Rep. 1-2 (1933)). It is quite understandable that Congress in 1934 would reenact a provision intended to compensate a small number of veterans who had been injured "by reason of mistreatment on the part of a Government agent." It is implausible, on the other hand, that Congress would have enacted or reenacted a provision intended to insure veterans treated by the VA for non-service-connected conditions against the risks of competently rendered medical care.

c. Respondent contends (Br. 33-37) that the 1962 amendment of Section 1151 to require the offset of benefits awarded to a veteran under the Federal Tort Claims

Act (FTCA) demonstrates that Congress could not have intended to require any demonstration of "fault" or "accident" under Section 1151. We perceive no incompatibility, however, between the availability of a standard tort action under the FTCA and the application of a "fault or accident" requirement to claims for benefits under Section 1151.

Section 1151 provides an informal, non-adversarial mechanism for the award of limited government benefits. After a claim is filed, the VA is required to assist the veteran in ascertaining the facts of his or her case. 38 U.S.C. 5107(a) (Supp. IV 1992); 38 C.F.R. 3.159. If those facts demonstrate that the veteran has incurred an additional disability by reason of some fault or accident, rather than merely by reason of foreseeable medical risks of proper treatment, then the veteran is entitled to prescribed pension and medical benefits, determined as though the additional disability were service-connected.[8] Moreover, in VA proceedings, including those under Section 1151, the veteran is statutorily accorded the benefit of the doubt on factual issues. 38 U.S.C. 5107(b) (Supp. IV 1992).

Under the FTCA, on the other hand, the same veteran is entitled to sue the government in an adversary proceeding.[9] In such a proceeding the veteran is required to pro-

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[8] As we noted in our opening brief (at 29-30), even leaving aside the issue of unforeseeable "accidents," the VA "fault" required under Section 1151 need not necessarily rise to the level of malpractice as defined for tort-law purposes.

[9] We are aware of no support for respondent's contention (Br. 33) that the results of the informal fact-finding conducted for purposes of evaluating an administrative claim under Section 1151 would have preclusive effect, as to either the veteran or the government, in a subsequent judicial proceeding under the FTCA. Respondent cites *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), but that case involved specific contractual and statutory pro-

cure and produce admissible evidence, and bears the burden of persuasion. If the finder of fact determines that the veteran has been injured through VA fault, then the veteran is entitled to collect full compensatory damages, including damages for pain and suffering.

Thus, claims under Section 1151 and under the FTCA offer distinctly different procedures, burdens, and potential benefits. Respondent relies on the special characteristics of the VA claims system to argue (Br. 16-20) that Congress could not have intended to impose any fault requirement on veterans seeking benefits. But the use of informal claims procedures, the provision of assistance to veterans in developing the facts of their cases, and the resolution of doubts in favor of veteran claimants do not change the substantive requirements established by the law for the award of benefits. Moreover, there is no inconsistency between an informal and generously structured administrative process leading to the award of limited benefits, and a much more formal and rigorous judicial process that can yield far greater compensation. Given the fully compensatory character of FTCA relief, it is easy to understand why Congress decided that veterans who recovered substantial sums in FTCA actions should not receive, in addition, duplicative benefits under Section 1151. That decision does not at all call into question the VA's construction of Section 1151 to require evidence of fault or "accident" as a predicate for the award of benefits under that provision.

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visions regarding the finality of administrative fact finding in government contract disputes. In contrast, the FTCA specifically provides that "[d]isposition of any claim by the * * * head of a federal agency shall not be competent evidence of liability or amount of damages" in judicial proceedings under the Act. 28 U.S.C. 2675(c).

4. Finally, respondent argues (Br. 37-45) that the VA's longstanding administrative and regulatory interpretation of Section 1151 is "impermissible legislation" (Br. 37), and in any event is not entitled to deference from the courts. The regulation in question (38 C.F.R. 3.358) is an interpretation and implementation of the benefits provided by statute, and plainly falls within the VA's statutory authority "to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the [VA] and are consistent with those laws." 38 U.S.C. 501(a) (Supp. IV 1992); see also 1924 Act § 5, 43 Stat. 608 (VA director "shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes"). In addition, we note that the portion of Section 3.358 at issue in this case was amended and readopted, after an opportunity for notice and comment, in 1978. 43 Fed. Reg. 34,505 (1978) (proposal); *id.* at 51,015 (final rule).

As to the merits of the regulation, the VA's construction of the statute is entitled to the same deference that this Court would accord any similar interpretation adopted by an agency charged by Congress with administering a federal statute. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). Congress has specifically delegated to the Secretary responsibility for the "proper execution and administration" of all "laws providing benefits and other services to veterans." 38 U.S.C. 303, 301(b) (Supp. IV 1992); see also 1924 Act § 5, 43 Stat. 608 (VA director "shall administer, execute, and enforce the provisions of this Act"). The VA informs us that in discharging that responsibility in fiscal 1993 alone it processed some 3.2 million documents relating to claims for compensation or pensions under the veterans' benefits statutes, and provided medical care to

more than 1.1 million inpatients at 171 VA hospitals and 165 VA nursing homes or domiciliary facilities.

Evaluating benefits claims regularly involves resolving factual and medical questions about the nature, source, and degree of a claimant's disability, as well as legal questions about the availability of benefits in particular factual situations. Those legal determinations, expressed both in general regulations and in individual adjudications, are informed by the VA's extensive experience in administering the veterans' benefits system, and reflect "a full understanding of the force of the statutory polic[ies]" in question that depends on "more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron,* 467 U.S. at 844 (quoting *United States* v. *Shimer,* 367 U.S. 374, 382 (1961)). Under those circumstances, the courts should defer to reasonable interpretations by the VA of the statutes that have been entrusted to its administration, just as they would defer to similar interpretations of other statutes by other administrative agencies. There is no indication that Congress's 1988 decision to provide for judicial review of VA regulations and decisions (Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988)), so as to provide veterans with the same protections available to recipients of other government benefits, was intended to deny to the VA the same deference that would normally be accorded by reviewing courts to any other administrative agency.[10]

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[10] See S. Rep. No. 418, 100th Cong., 2d Sess. 49-62 (1988); see especially *id.* at 50 (statute provides opportunity for review "in a manner similar to that enjoyed by claimants before almost all other Federal agencies"), 60 (scope-of-review provisions for non-factual issues "are derived specifically from section 706 of the APA. Thus, it is the Committee's intention that the court shall have the same authority as it would in cases arising under the APA to review and act upon questions other than matters of material fact * * * such as questions concerning the validity of a rule or regulation").

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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